

Before the
Federal Communications Commission

In the Matter of)
)
Rural Health Care Support Mechanism) WC docket No. 02-60

Reply Comments of the Montana Telecommunications Association

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Introduction

MTA reiterates its concern that the proposed infrastructure program is ill advised at best, and likely violates §254 of the Telecommunications Act. The Commission should first do no harm. The Infrastructure program, along with its predecessor Rural Health Care Pilot Program (RHCPP), will attract controversy, at the least, and divert both the Health Care Program and health care providers, from their primary missions. At worst, the proposed Infrastructure Program will thwart private investment in rural broadband infrastructure and imperil the very goals that the National Broadband Plan embraces.

MTA concurs with comments, such as those of the Eastern Montana Telemedicine Network and the American Telemedicine Association, that rural health care support is better targeted to support costs associated with the Rural Healthcare Support and Health Broadband Services Programs. We further concur with comments that support expanding the definition of “eligible health care provider” to include additional healthcare-related entities.

The Proposed Infrastructure Program Is Ill-Advised

The Eastern Montana Telemedicine Network (EMTN) notes that it has 36 partners in 26 communities. It attributes its success in part to the Rural Health Discount Program. As MTA pointed out in its January 11, 2010, *ex parte* comments, EMTN serves far more partners in more communities, covering more geography in the least populated areas of Montana, far more cost effectively than the other RHCPP project in Montana, the Health Information Exchange of Montana (HIEM).

Part of EMTN’s success is that it has obtained “cost effective access to broadband communications services while supporting our communication industry throughout the state and region.” (EMTN, p. 1) In fact,

EMTN does not support the concept of the Health Infrastructure program and believes that re-targeting the program to cover one time charges to include construction costs from the Central Office (CO) to the healthcare facilities will better serve the healthcare community. (EMTN, p. 1)

Instead of funding the proposed Infrastructure Program, EMTN supports an increase in the financial support level of the Broadband Service program.

Similarly, the American Telemedicine Association (ATA) describes the proposed Infrastructure Program as “ill advised” and recommends that funds allocated to the proposed Infrastructure Program should be reprogrammed.

Experience has shown that a community's needs are best met through a common infrastructure. (ATA, p. 3)

ATA notes several flaws in the proposed Infrastructure Program. For example, it “duplicates, and possibly conflicts with, the efforts of the Broadband USA program.” In this regard, as MTA pointed out in its initial comments, funding the construction of new telecommunications infrastructure by one Universal Service Program (Rural Health Care) effectively conflicts with support provided by another Universal Service Program (High Cost). (MTA, p. 7)

ATA further argues that the “proposed program would require health providers to also be in the business of telecommunications construction.” (ATA, p. 4)

The program, as proposed, encourages the use of federal funds to purposely overbuild broadband networks. A provision allowing reselling of excess capacity to non-healthcare customers, at best, thwarts Congressional intent in ways that are probably not legally allowed by any other federal program. This is tantamount to a federal hospital construction program that allows grantees to purposely overbuild a hospital, allowing the excess capacity to be used as a hotel. (ATA, p. 5)

Verizon and Verizon Wireless (Verizon) similarly note that

Rural healthcare providers, however, are not generally in the business of running broadband networks, and this situation becomes even more complicated if a program applicant could be allowed (or even expected) to provide broadband services to both itself and to others. Moreover, RHC support, as well as other universal service funding, should not be used to

create subsidized competition. See, e.g., *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶¶ 46-51 (1997) (“*First Report and Order*”) (adopting “competitive neutrality” as an additional guiding principal of USF policy). (Verizon, p. 5)

As MTA stated in its initial comments, the Commission has placed a priority on leveraging existing network assets as the most cost effective means by which to maximize access to broadband capacity by rural health care providers. (MTA, p. 6) Moreover, such leverage expands both scale and scope of public network infrastructure. ATA and others (e.g., Verizon, Montana Independent Telecommunications Systems) agree.

The proposed program limits health care as the sole use of broadband connectivity. In fact, broadband connections are needed in rural America for a host of services in addition to healthcare including education, public safety, libraries, entertainment and retail uses. (ATA, p. 5)

Verizon adds that

Putting healthcare providers in the network construction and management business raises some concerns regarding their ability to oversee network operations in a way that would avoid stranded investment of universal service dollars...RHC fund support for network construction would also be additive of broadband facility support that the Commission envisions distributing in rural areas through the new Connect America Fund and the Mobility Fund. (Verizon, pp. 2-3)

ATA also raises concerns with the proposed Infrastructure Program’s focus on “large pipes.” And Verizon raises concerns about the competitive neutrality of a program that confers

unfair advantage to any one class of providers or any one technology over another. *First Report and Order* ¶¶ 46-51. Nonetheless, the Commission seems to suggest in multiple parts of the RHC NPRM that two individual network providers—Internet2 and National LambdaRail (NLR)—will have some sort of special funding status going forward... There is no basis, however, to suggest that Internet2 and NLR should receive special treatment. These entities provide dedicated nationwide network backbone services like many competing network service providers. (Verizon, p. 6)

The Rural Health Care Program Should Be Re-Sized

The Montana Independent Telecommunications Systems (MITS) points out that in the 14 years since the inception of the Rural Health Care Program, the Commission's authorized cap of \$400 million has never been reached. In fact, as MTA previously has commented, the Commission finds that "the program generally has disbursed less than 10 percent of the authorized funds each year." (*In the Matter of the Rural health Care Support Mechanism*. WC 02-60. FCC 07-198. Adopted: November 16, 2007. Released: November 19, 2007. Order, ¶ 14.) MITS suggests that given the fact Rural Health Care support has experienced a consistent allocation level of around \$40 million, not \$400 million, a more rational response would be to reduce the level of authorized funding rather than "adopting proposals to relax the program rules simply to spend a certain level of funds." (MITS, p. 4) Certainly in the private sector, if a program, product or service fails to meet projected goals, a private business enterprise is far more likely to retarget resources to something more productive. As Verizon asserts, if "program support still remains below the cap, the Commission should not view that outcome as a failure." (Verizon, p. 2) It should move on and find a better use of precious universal service funds.

The Telecommunications Act Does Not Authorize Funding an Infrastructure Program.

Verizon states that "The RHC fund is foremost a program designed to provide discounts for "services provided to health care providers for rural areas in a State. . ." 47 U.S.C. § 254(h)(1)(A) (emphasis added). (Verizon, pp. 3-4.) Telecommunications facilities are not services.

And ATA, as noted above, suggests that "allowing reselling of excess capacity to non-healthcare customers, at best, thwarts Congressional intent..." (ATA, p. 5)

On the other hand, HIEM, for example,

agrees with the Commission's prior finding that leasing excess capacity for nonhealth care uses does not violate the resale restrictions in the Act – as

long as the proceeds are used solely to support and sustain the network. The key consideration is that constructing excess capacity imposes no additional cost whatsoever on the federal universal service fund (“USF”). Moreover, leasing excess capacity cannot constitute a “transfer” within the meaning of Section 254(h)(3), because ownership and control of the facilities remains with the project. (HIEM, p. 6)

MTA fundamentally disagrees. Nowhere does the Act mention that it’s permissible to resell capacity as long as the proceeds are used solely to support the network. Nowhere does the Act say that it’s permissible to sell (or lease) excess capacity if it imposes no additional cost on the Universal Service Fund. (As Verizon notes, above, the Infrastructure Program *does* impose additional costs on the Fund. Moreover, to the extent that high cost support already supports high cost networks, then the proposed Infrastructure Program would support duplicate networks at the expense of the universal service Fund). And nowhere does the Act say it’s permissible to “transfer” assets when ownership and control of the facilities remains with the project. Significantly, HIEM neglects completely to mention the Act’s prohibition on sale, lease or transfer of assets “for consideration” (such as consideration for meeting matching fund requirements, or consideration for purposes of sustainability of the health IT network itself.)

Indeed, the Act quite clearly states that telecommunications services provided under the Rural Health Care program to qualified health care institutions

may not be sold, resold, or otherwise transferred by such user *in consideration for money or any other thing of value.* (emphasis added.)
47 U.S.C. §254(h)(3)

If the Commission Adopts the Proposed Infrastructure Program, Due Diligence Precautions against Waste, Fraud and Abuse Need To Be Strengthened

Several comments—generally health care providers who are receiving infrastructure grants under the Pilot Program—argue that restrictions that are aimed at achieving the public demand for transparency and accountability while

minimizing the potential for waste, fraud and abuse are excessive or burdensome. MTA disagrees.

First, MTA reiterates that the Commission should eliminate the Infrastructure program altogether. However, if the Commission ultimately decides to fund the Infrastructure Program in some manner, MTA urges the Commission to require Infrastructure projects to demonstrate unequivocally that construction of new telecommunications infrastructure is the only option available to attain sufficient bandwidth for a health care network's demonstrated needs.

It is hard under any circumstances to imagine how new construction is more efficient or cost effective than leveraging existing network infrastructure, especially when new construction supports a limited-purpose network.

Verizon states that

it is difficult to conceive of a case where it could actually be less expensive to build and operate an entirely new rural broadband network versus purchasing services from an existing provider that already has facilities in place. This is especially true if, as it should be, any proposed ongoing RHC fund support that an applicant would need to run a new network built with universal service subsidies is also considered in determining whether an over-build project would be "significantly less expensive." (Verizon, pp. 3-4.)

As MITS points out, even a "finding" that somehow new construction is more efficient than leveraging existing infrastructure is based on a static analysis assumption that existing network prices, or capacity, will not change. In fact, capacity continuously is expanding at a historically unprecedented pace and the cost of bandwidth constantly is decreasing. Requiring a health care provider, or USAC, to predict reliably the dynamic economic forces that affect an accurate "sufficiency" analysis is a tall, if not impossible, order.

Certainly the least an applicant should be required to do is demonstrate unequivocally that somehow building new telecommunications infrastructure is more efficient or cost effective than leveraging existing network infrastructure. Such a demonstration must include short term and long term economic effects of new infrastructure construction. It should include an accurate and reliable

determination of what bandwidth capacity is needed, when, and why. It should include a full cost accounting, operations and maintenance projections. Any health care infrastructure proposal must demonstrate not only that the applicant has “conducted all reasonable due diligence to identify potential service providers in the proposed service areas and that such providers received copies of any RFPs,” (HIEM, p. 16) but also that the applicant has received an affirmative response from all potential service providers in the proposed service areas that the providers cannot and will not provide broadband capacity to the health care provider, even if subsidized by the Rural Healthcare Support or Health Broadband Services Programs. Merely demonstrating that the applicant has sent or posted RFPs for service provider responses doesn’t prove that the providers received, reviewed or were able to respond to the RFP. And, as we have learned in Montana, the receipt of an RFP does not mean that the applicant necessarily is willing or able to accommodate various cost effective options presented in the response. The applicant must, in short, provide justification for rejecting any response(s) from provider(s).

HIEM argues that proposed infrastructure projects should not be required to place even a 15 percent match as good faith collateral. Instead, HIEM and others would rather provide “in-kind” matches. Besides being difficult, if not impossible, to measure the actual value of “in-kind” contributions, such a relaxation of an up-front commitment by potential project managers fails to provide sufficient security to the universal service program against waste, fraud and abuse. Fifteen percent is a minimal expression of good faith commitment to a project. Reducing that commitment further to a nebulous “in kind” contribution imposes unacceptable risk to the universal service Fund.

MTA Does Not Oppose Expanding the Definition of “Eligible Health Care Provider”

Several comments indicated support for expanding the definition of “eligible health care provider” to include certain administrative expenses, data centers, skilled nursing facilities and renal dialysis centers. Further, comments

such as those of HIEM, for example, recommend expanding the Broadband Services Program to include urban health care locations that are part of a rural health care network. MTA does not oppose such proposals. In fact, it is recommendations such as these—to enhance implementation of the Broadband Services Program and Rural Healthcare Support Programs—that should be the focus of the Commission’s efforts to reform the Rural Health Care Program.

Conclusion

As representatives of both the telecommunications provider community and telemedicine providers attest, the Commission should eliminate the proposed health care Infrastructure Program and focus instead on the Broadband Services and Rural Healthcare Support Programs. The Commission already finds little utility in building infrastructure under the Rural Health Care Program, finding instead that dedicated Internet access (DIA) “is available everywhere...the major barrier for medium and large providers is not access—it is price.” (MTA, p. 8, quoting OBI Technical Paper No. 5)

MTA welcomes the opportunity to discuss its concerns with the Commission at any time and we invite Commissioners and/or Commission staff to visit Montana to witness firsthand the success and flaws of the Rural Health Care Pilot Program, the lessons from which have contributed substantially to MTA’s testimony in this proceeding.

Respectfully submitted,

/s/

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